No. 77-1806

In the Supreme Court of the United States

October Term, 1978

FORD MOTOR COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

AND

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus curiae* is filed in support of the position of the respondents by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 107 national and international labor unions, having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for by Rule 42 of the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Where employees have selected a collective bargaining representative, Congress has determined "that free opportunity for negotiation with [the] accredited representative * * * is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." (*Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 45.) "The basic theme of the [National Labor Relations] Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement." (*Porter Co.* v. *NLRB*, 397 U.S. 99, 103.)

Nonetheless, in this case the petitioner argues that this Court should endorse the view that matters that fit comfortably within the statutory terms defining mandatory bargaining subjects should be determined by employer fiat and not by collective bargaining, if in the Board's, or a reviewing court's, judgment "the matter * * * lack[s] sufficient significance to give rise to a bargaining obligation * * *." (Pet. Br. 11.) But Congress has placed its trust in the parties' common sense and self-interest to settle industrial disputes rather than in administrative or judicial determinations of what labor-management disagreements are important or "trifles" (*Westinghouse Electric Corp.* v. *NLRB*, 387 F.2d 542, 550 (C.A. 4)).

Congress declared the statutory right of employees to bargain collectively through representatives of their own choosing with respect to wages, hours and working conditions in order to enable the employees to establish *jointly* with management the basis on which the employees would provide their labor. It thus left it to each party to determine

for itself the relative importance of each matter in dispute and on that basis to decide whether to make a concession in return for obtaining agreement, or to stand fast, and resort to self-help if need be, with the sacrifices and risks that entails. An administrative or judicial determination that an issue is not sufficiently significant to be a subject of collective bargaining to that extent curtails the congressionally preferred process for settling labor disputes and leaves the matter in the exclusive control of management, although without explaining why, on principle, supposed "trifles" should be resolved according to the employer's wishes rather than the employees'. Such determinations cannot therefore be reconciled with Congress' judgment that government is not competent to evaluate the merits of the contending positions of labor and management concerning the basis of their relationship.

In part 1 of our argument we show that the language of §§8(a)(5) and 8(d) of the Act and this Court's decisions construing those provisions establish that proposals going to the basis of the employer-employee relationship are mandatory subjects of bargaining, and that in-plant food prices are part and parcel of that relationship. In part 2 we demonstrate that the Act's legislative history and its animating purposes—to encourage collective bargaining and to preclude governmental regulation of employment conditions—further buttress the conclusion that petitioner violated its bargaining obligation here. Finally, in part 3 we show the inadequacy of the arguments which petitioner draws from certain lower court decisions and from decisions of this Court not in point.

The sum of our demonstration is that petitioner is entirely correct that "Section 1 of the Act makes clear [that]

the Act was designed and intended to preserve and promote industrial peace and stability and to avoid labor strife * * * [and] that whether a specific matter is a mandatory bargaining subject is to be measured, in part, by reference to this purpose." (Pet. Br. 27.) But that section, and the entire Act, make no less clear that the means to that end chosen by Congress is to encourage the settlement of labor-management disputes by free collective bargaining, rather than to permit such disputes to fester by privileging "refusals to confer" (*Jones & Laughlin,* 301 U.S. at 42) on matters relating to the employer-employee relationship that persons other than the affected employees deem "trifles".

ARGUMENT

1. We begin, of course, with the text of the statute, which petitioner quotes but does not discuss. Section 8(a)(5) of the Act declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *." Section 8(d) defines the duty to bargain to be "the performance of the mutual obligation of the employer and the representative of the employees to * * * confer in good faith with respect to wages, hours and other terms and conditions of employment * * *." As this Court declared in *Fibreboard Corp.* v. *Labor Board,* 379 U.S. 203:

> "Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . .' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. *Labor Board* v. *American Ins. Co.,* 343 U.S. 395. As to other matters, however, each party is free to bargain or not to bargain . . .".

> [379 U.S. at 210 quoting *Labor Board* v. *Borg-Warner Corp.,* 356 U.S. 342, 349.]

And the very decisions of this Court which have held particular subjects to be *outside* § 8(d) have stated the test for coverage to be whether the provision "regulates the relations between the employer and the employees". (*Borg-Warner, supra,* 356 U.S. at 350.) See also, *Chemical Workers* v. *Pittsburgh Glass,* 404 U.S. 157, 178: "In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and employees".

The subject of how much employees must pay for food bought at an in-plant cafeteria or from in-plant vending machines and consumed during their lunch hour or on breaks is plainly "an aspect of the relationship between the employer and the employees". The core of that relationship is the price at which the employees sell their labor. That price is rarely set entirely in cash wages. Rather it includes a variety of benefits that increase the employees' well-being —hospitalization, payment of doctor, dentist and medical bills, pensions, etc. And, just as the employee whose collective agreement provides for X-dollars an hour plus health coverage is better off than an employee who receives only X-dollars an hour, so an employee whose collective agreement provides for X-dollars an hour plus a decent meal in a pleasant place, both paid for by the employer, is better off than an employee who receives only X-dollars an hour.[1]

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[1] The foregoing demonstrates that the contention that an "employee who purchases food from a cafeteria or vending machine located at the place of his or her employment is in essentially the same position as the employee who purchases food in a nearby public restaurant" (Pet. Br. 26) proves too much. Health insurance

Any profit the employer makes from in-plant food services is *pro tanto* a diminution of his employees' wages, and any cost to the employer is a form of employee compensation. It follows, we believe, that when employees seek their employer's agreement that he will provide a time to eat, a place to eat, and the food consumed they are raising mandatory bargaining subjects.[2] The employer, of course, has

and retirement and survivors benefits can also be obtained in the open market; yet it is established that these are mandatory subjects of bargaining. (See *e.g., Chemical Workers* v. *Pittsburgh Glass, supra,* 404 U.S. at 159 and n. 1.) Rather than facing up to the holdings that such benefits are within § 8(d) petitioner simply omits them from its otherwise fairly exhaustive list of matters which have been held to within the scope of the phrase "terms and conditions of employment" (Pet. Br. 23-25, text and notes at ns. 15-32). *Inland Steel Co.* v. *N.L.R.B.*, 170 F.2d 247 (C.A. 7.), *cert. denied on this point*, 336 U.S. 960, the leading case on the duty to bargain over pensions, for example, is cited only for the proposition that "compulsory retirement age" is a mandatory bargaining subject (Pet. Br. 24, text and note at n. 27).

[2] For the reasons stated in the text, the subject at least in part also comes within the statutory words "wages" and "hours". However, we need not press that point because, at the very least, the proximity of this subject to wages and hours reinforces the proposition that it involves "terms and other conditions of employment". (Compare *Inland Steel, supra.*)

We note also that the existence of an adequate opportunity to eat during the working day is obviously a matter affecting the health of the employees, and since it plainly affects their morale and efficiency, relates also to the quality of their job performance. Moreover, the presence and the quality of eating facilities is a part of the employees' working environment is also an element of the employer-employee relationship, as indeed this Court has recognized in *Labor Board* v. *Washington Aluminum Co.*, 370 U.S. 9, 15-16. The issue in *Washington Aluminum* was whether a concerted refusal to work in, and protest of, an unheated room was protected activity; this turned on the scope of the term "labor dispute" in

the right to resist each and every one of these bargaining demands. And, the ultimate solution—including an employer guarantee that certain food will be provided at a certain price—will be the product of the parties' relative strength, their evaluation of the relative importance of the issue, and, to the extent a compromise is reached, their ingenuity and flexibility.[3]

Petitioner places heavy reliance on certain language in Mr. Justice Stewart's concurring opinion in *Fibreboard, supra,* 379 U.S. at 217-226. (Pet. Br. 22-23.) If the difference between the views of the opinion of the Court and those of the concurring Justices were germane to the issues in the present case, the governing statement of the law would be, of course, the Court's opinion, which petitioner merely notes in passing. (Pet. Br. 25, n. 31.) But those differences as to how to harmonize the free enterprise and free collective bargaining systems are presently irrelevant, for the concern addressed in the concurring opinion—that mandatory bargaining about some forms of subcontracting would impermissibly interfere with "managerial decisions, which lie at the core of the entrepreneural control" (*id.* at 223)—lies at the opposite end of the spectrum from petitioner's

§ 2(9) of the Act which, as we develop below, is almost identical in its operative language to § 8(d).

[3] Although we have stressed the point of principle that the scope of the duty to bargain does not depend on the importance of the employees' or the employers' proposal, we by no means accept the contention that cost of food which employees purchase in the plant does not have a significant impact on them. (See Pet. Br. 25.) A simple comparison will make our point: if only the price of the hot courses offered (or of sandwiches, etc.) is raised by 10¢, the weekly increase in cost to each employee who buys his lunch at a plant cafeteria is 50¢ a week; this is more than he gains from a 1¢ an hour wage increase.

concern in this case. Here Ford nowhere contends that the price which its employees must pay for in-plant food service is one "of those management decisions which are fundamental to the basic direction of a corporate enterprise * * *" (*id.*). On the contrary, petitioner's principal point is that this is too trivial a matter to call for bargaining. But the concurring opinion in *Fibreboard* contains not the slightest suggestion that a matter which bears on the employer-employee relationship is to be excluded from the mandatory subjects of bargaining because either party, the Board, or the courts consider it to be insignificant.

Petitioner's reliance on *Chemical Workers* v. *Pittsburgh Glass, supra,* is likewise misplaced. In *Teamsters Union* v. *Oliver*, 358 U.S. 283, 293-294, this Court recognized that the "point" of a bargaining demand that appears to address a subject other than the employer-employee relationship may in fact be the bargaining employees' own wages, hours and working conditions. As the *Chemical Workers* Court explained, "Although normally matters involving individuals outside the employment relationship do not fall within [the] category * * * [of] * * * issues that settle an aspect of the relationship between the employer and employees * * * they are not wholly excluded". (404 U.S. at 178.) The limit of that doctrine is that such matters must "vitally affect the 'terms and conditions' of * * * the bargaining unit employees' * * * employment." (*Id.* at 178-179.) The *Oliver-Chemical Workers* test thus states a mediating principle between an interpretation of §8(d) which looks only to whether a bargaining demand is formally addressed to the employer-employee relationship, and an interpretation which looks to whether a demand not so addressed raises an issue that in any way affects the bargaining employees. The first, of course, invites manipulation and, as *Oliver* teaches, would stultify bargaining even over wages; the second, given our interdependent economy, threatens the principle that the bargaining "obligation extends only to the 'terms and conditions of employment' of the employer's 'employees' in the 'unit appropriate for such purposes; which the union represents" (404 U.S. at 164). Nothing this Court has said or done invites the Board and the lower courts to evaluate the merits of bargaining demands where the competing consideration which necessitated the *Oliver-Chemical Workers* inquiry are not present. And where the bargaining demand is plainly addressed to the employer-employee relationship, there is no consideration—and petitioner has proffered none—which would override the twin policies stated at the outset of the argument which militate against government evaluation of the merits of the parties' bargaining position (see pp. 2-3, *supra*).

In sum, the Act's language setting the scope of mandatory bargaining, as interpreted by this Court, appears to be more than broad enough to include bargaining over in-plant cafeteria and vending machine prices. It would, therefore, require a powerful showing from the Act's legislative history to read those words so restrictively as to exclude that subject. But that legislative history calls for a generous rather than a restrictive interpretation. Indeed, it establishes that the words "terms and conditions of employment" were used in their broadest sense.

2. (a) Section 9(a), to which §8(a)(5) refers, has, from the beginning, provided, and still provides, as follows:

> Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall

> be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to *rates of pay, wages, hours of employment, or other conditions of employment* * * *. [Emphasis added.]

And § 2(9) defines the term "labor dispute" as including:

> any controversy concerning *terms, tenure or conditions of employment*, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms and conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. [Emphasis added.]

That definition, in turn, was adopted *in haec verba* from § 13(c) of the Norris-LaGuardia Act, 47 Stat. 70 *et seq.*, 29 U.S.C. § 101 *et seq.* Speaking of § 13(c), Mr. Justice Black wrote: "Congress made the definition broad because it wanted it to be broad." (*Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330, 335, a case in which the issue was the scope of the phrase "terms and conditions of employment". See *id.* at 336.) This Court has recognized that this language has the same meaning in Norris-LaGuardia and the NLRA. (See *Fibreboard, supra,* 379 U.S. at 210, citing *Railroad Telegraphers.*)

In considering what became § 8(d) of the Act, the 1947 Congress considered and rejected proposals for narrower words, offered in an effort to curtail the scope of labor-management negotiations. The bill which passed the House (the Hartley bill) had enumerated the particular subjects which were to be encompassed within the terms "collective bargaining" and to constitute the scope of bargaining required by the Act.[4] The Senate bill in contrast took the

[4] H.R. 3020, 80th Cong., 1st Sess., § 2(11), 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), 163-167 (hereafter "Leg. Hist."); House Report No. 245, 80th Cong., 1st Sess., 22-23, 1 Leg. Hist. 313-314. Section 8(b)(3) of the Hartley bill would have prohibited "strike[s] or other concerted interference with an employer's operations, an object of which is to compel the employer to accede to the inclusion in a collective-bargaining agreement of any provisions which under § 2(11) is not included as a proper subject matter of collective bargaining." (1 Leg. Hist. 179.)

approach of § 8(d) as enacted except that the phrase "working conditions" was used. This phrase was changed to "conditions of employment" in response to Senator Wagner's fear that "working conditions" would narrow the scope of collective bargaining. Sen. Wagner said:

> By substituting the narrower term "working conditions" for the present broader term "conditions of employment", the bill would narrow the scope of collective bargaining to exclude many subjects, such as, perhaps, pension plans, insurance funds, which properly belong in the employer-employee relationship and in regard to which the employer should not have the power of industrial absolutism. [1 Leg. Hist. 998]

The Conference Committee adopted the Senate's provision in preference to the Hartley bill's restriction on the scope of the bargaining obligation. And, while the House bill had dropped the definition of "labor dispute," the conferees also preserved the broad definition of that term. In light of this history, it is clear that a narrow reading of the statutory phrase would override the Congressional judgment. Compare *Labor Board* v. *Drivers' Local Union,* 362 U.S. 274, 288-289 (relying on the Conference Committee's rejection of the Hartley bill's limitation on the right to picket); *Newspaper Pub. Assn.* v. *Labor Board,* 345 U.S. 100, 108-109 (contrasting the Conference Committee's narrow provision on "featherbedding" with the sweeping prohibition of the Hartley bill).

Indeed, petitioner's position here entails a more severe restriction on collective bargaining than that proposed in the Hartley bill. The House Report explaining § 2(11) of that bill stated:

> Reference has already been made to liberties the Board has taken with the term "collective bargaining" due to the absence from the present act of language defining the scope of bargaining. The last paragraph of § 2(11) cures this defect, limiting the scope of bargaining by either employees or unions to matters of *mutual* concern. [H. Rep. No. 245, *supra*, at 22, 1 Leg. Hist. 313 (emphasis in original).]

It is precisely our point that whether, how and at what price food is provided at the plant are matters of "mutual concern" as to which the employer must bargain.

Against all this petitioner argues:

> In the 1947 revision of that Act, the House bill contained a detailed list of mandatory bargaining subjects, which did not include in-plant food prices and services, and confined the duty to bargain to the subjects listed. • • • [t]he Senate's amendment did not set forth a definition of collective bargaining. In conference between the House and Senate, the specific listing in the House bill was dropped and the Senate version was accepted. • • • However, the accompanying Conference Report shows that the intent of the Congress was to retain the restrictive approach of the House bill. Thus the Report stated with respect to the Senate version, and therefore with respect to the present Section 8(d), that while "this section did not prescribe a purely objective test of what constituted collective bargaining as did the House Bill, [it] had to a very substantial extent the same effect . . ." [Pet. Br. 21-22, footnotes omitted.]

But when one reads the entire sentence in the House Conference Report from which petitioner plucked the phrase on which its argument rests, that argument turns to dust:

> Hence, the Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect *as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties.* [H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 34, 1 Leg. Hist. 538. Emphasis added to show the omitted final portion of the sentence quoted at Pet. Br. 22.]

And, if more is needed, Justice Stewart's concurring opinion in *Fibreboard,* pressed into service by petitioner for a proposition not there asserted, is relevant in that it expressly rejects petitioner's reading of the House Conference Report:

> The conference report accompanying the bill said that although this section [8(d)] "did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, [it] had to a very substantial extent the same effect . . ." I LMRA 538. Though this statement refers to the entire section, it is clear from the context that the focus of attention was upon the procedures of collective bargaining rather than its scope. [379 U.S. at 221, n. 5.]

(b) The Act's language and legislative history teach two additional lessons relevant here, each of which supports the conclusion that in-plant food prices are a mandatory subject of bargaining.

First, in § 1 of the Act, adopted in 1935:

> It is • • • declared to be the policy of the United States to eliminate the causes of certain substantial

> obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining * * *.

Congress adopted this policy because "Refusal to confer and negotiate has been one of the most prolific causes of [industrial] strife". (*Jones & Laughlin, supra,* 301 U.S. at 42.) As early as 1902 an industrial commission report noted:

> The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining directly between employers and employees is, that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it. Most strikes and lockouts would not occur if each party understood exactly the position of the other. [H.R. Doc. No. 380, 57th Cong., 1st Sess., 844 (1902).]

As this Court added in *Fibreboard, supra*: "One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation". (379 U.S. at 211.) Accordingly the Court there read §8(d) so as to enhance rather than curtail the statutory obligation to negotiate.

The statement of policy in the Hartley bill would have eliminated all reference to encouraging collective bargaining. (See 1 Leg. Hist. 160.) But the 1935 statement of policy (quoted above) was reaffirmed in 1947, despite other changes in §1. For, in Senator Taft's words, twice cited as authoritative by this Court:

> Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on the free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. In the long run, I do not believe that that right will be abused. * * * [2 Leg. Hist. 1007, quoted in *Bus Employees* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, 395, n. 21; see also *Bus Employees* v. *Missouri,* 374 U.S. 74, 82 n. 9, quoting a subsequent passage to the same effect.]

The interpretation of §8(d) for which petitioner contends is wholly inconsistent with Senator Taft's reaffirmation of the importance of the employees' freedom to strike. Excluding from mandatory bargaining some aspects of the employer-employee relationship to that extent deprives the employees of the right to protect themselves by collective action against what they consider to be "arbitrary and unfair treatment". (See *Jones & Laughlin,* 301 U.S. at 33.[5])

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[5] Mr. Chief Justice Hughes there recalled:

> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209.

Second, in that floor statement Senator Taft made it plain that the 1947 Congress' support of free collective bargaining was the product not only of trust in that system but also of distrust in government regulation of wages, hours and working conditions:

> We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices and working conditions. But if we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy. If we give the Government power to fix wages, I do not see how we can take from the Government the power to fix prices; and if the Government fixes wages and prices, we soon reach the point where all industry is under Government control, and finally there is a complete socialization of our economy. [2 Leg. Hist. 1007.]

In this regard the 1947 amendments continued and emphasized a point implicit in the original Act:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. * * * [I]t was [also] recognized from the beginning that agreement might in some cases be impossible and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. [*Porter Co.*, 397 U.S. at 103-104.]

Indeed, the office of the portion of §8(d) that writes the good faith test of collective bargaining into the Act is to make it "clear that the Board may not, either directly or

indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (*Labor Board* v. *American Ins. Co.*, 343 U.S. 395, 404.) See also *Labor Board* v. *Insurance Agents*, 361 U.S. 477, which emphasizes that "the Board was not viewed by Congress as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining * * *", and in consequence that §8(d) was enacted "to prevent the Board from controlling the settling of the terms of collective bargaining agreements." (*Id.* at 486, 487.)

This limitation on the authority of the Board and the courts does not negate the limits imposed on the scope of mandatory subjects any more than it disables the Agency, subject to judicial review, from enforcing "the principle that [the parties] are bound to deal with each other in a serious attempt to resolve differences and reach a common ground" (*Insurance Agents*, 361 U.S. at 486). Section 8(d) in its entirety does, however, makes it plain that the Board and the courts do not have the authority to substitute their views as to what is desirable for the parties' view. Yet, once the Board and the courts depart from objective criteria, such as whether the issue is one relating to the employer-employee relationship, rather than the internal affairs of either party (cf. *Borg-Warner, supra,* 356 U.S. at 350), to whether the aspect of the employer-employee relationship raised is significant or trivial, they must inevitably resort to making the kind of policy determinations which Congress directed them to eschew.

In *Westinghouse, supra,* the Fourth Circuit said that in construing §8(d): "Balanced and effective collective bargaining should be the ultimate objective." (387 F.2d at

550.) That court thereby unconsciously echoed the rhetoric the Board employed in *Insurance Agents' International Union,* 119 NLRB 768, 772, which was expressly disapproved by this Court on review, 361 U.S. at 497, text and note at n. 29.[6] In *Insurance Agents'* the notion of "balanced bargaining power" was disapproved because "if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." (*Id.* at 490.) The *Westinghouse* reasoning, which petitioner embraces here, actually compels "the Board's entrance into the substantive aspects of the bargaining process" through the making of value judgments that grant the employer the right to set "substantive terms" without bargaining at all.

Our argument to this point, and the meaning of §8(d) were lucidly summarized by the present Chief Justice, writing for the Court of Appeals in *Fibreboard*:

> The purpose of imposing legal duties upon employers to meet and bargain with the representatives of employees is to create a structure of industrial self-government for a particular plant arrived at by consensual agreement between management and employees within the framework of the statute. See United Steelworkers v. Warrier & Gulf Nav. Co., 363 U.S. 574, 580-581, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). By guaran-

[6] [The Board] has sought to introduce some standard of properly "balanced" bargaining power, or some new distinction of justifiable and unjustifiable, proper and "abusive" economic weapons into the collective bargaining duty imposed by the Act. • • • We have expressed our belief that this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced. [Footnotes omitted.]

> teeing employee participation in decisions relating to wages, hours, terms and conditions of employment, Congress made a determination that this would create an environment conductive to industrial harmony and eliminate costly industrial strife which interrupts commerce.
>
> In framing Section 8(d) of the Act, 29 U.S.C. § 158 (d), Congress was incorporating the decisions of the Board and the Courts defining the duty to bargain collectively. The statutory definition of those subjects about which the parties were required to bargain was of necessity framed in the broadest terms possible: wages, hours, terms and conditions of employment. The use of this language was a reflection of the congressional awareness that the act covered a wide variety of industrial and commercial activity and a recognition that collective bargaining must be kept flexible without precise delineation of what subjects were covered so that the Act could be administered to meet changing conditions. [*East Bay Union of Machinists Local 1304* v. *NLRB,* 116 U.S. App. D.C. 198, 201, 322 F.2d 411, 414, affirmed, *sub. nom. Fibreboard Corp.* v. *Labor Board,* 379 U.S. 203, 211.]

3. In part II of its brief (pp. 29-35), petitioner dismisses as irrelevant a series of factors which, in the Court of Appeals' view distinguish the present case from prior decisions in which that court and other lower courts had held that bargaining over in-plant food prices is not mandatory. We agree that the duty to bargain does not turn on the presence or absence of these factors; but we draw therefrom the opposite conclusion—*viz.,* that the earlier Court of Appeals' decisions were erroneous and that the distinctions the court below drew are unnecessary to support the correct result it reached. Indeed, when one strips away

those elements which petitioner now says are irrelevant from the circumstances on which the Fourth Circuit relied in the leading *Westinghouse* case (387 F.2d 542), all that remains is the untenable proposition that in-plant food prices are mere "trifles" (*id.* at 550) and for that reason are not a mandatory bargaining subject.

(a) The Courts of Appeals in *Westinghouse* and *NLRB* v. *Ladish Co.*, 538 F.2d 1267 (C.A. 7) relied in part on the employers' asserted inability to set the price at which food was sold to the employees in the plant. The *Westinghouse* court believed that this meant there could only be "fictional bargaining", which the Act does not require. (387 F.2d at 550.)

Petitioner argues first that "the peculiarities of the particular agreement [between the employer and the food service contractor] under which food is provided are clearly irrelevant," and then that "Ford lacked the power to establish food prices." (Pet. Br. 30.) The latter assertion raises an issue of fact, which has been decided against petitioner by the Board and the Court of Appeals, and which does not warrant further review.[7] Thus it would avail Ford nothing even if §8(d) were read to exclude food prices from bargaining where the employer has left the price to the contractor's unfettered decision. But we do not wish to leave unanswered the *Westinghouse* court's "fictional bargaining" point which petitioner eventually adopts. (Pet. Br. 30-31.)

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[7] See e.g., *Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502; *South Prairie Constr. Co.* v. *Operating Engineers*, 425 U.S. 800, 803-804. That the Board's finding was correct is clear from the terms of the agreement between Ford and ARA, joint exhibit 21 quoted at Pet. Br. 5-6.

We note at the outset that it must be a rare, if not totally imaginary case, in which the employer relinquishes all control over quality and price of food served on its premises to its employees, and lacks bargaining power to cause the contractor voluntarily to improve quality and/or lower prices. After all, only an employer wholly indifferent to the welfare of his employees—and willing to risk undermining their morale and productivity—would view with equinimity their being over-reached by the contractor. And only a most unusual contractor who would insist on the letter of his contractual rights knowing that when the contract terminates, the employer may choose not to renew it.

But even in the largely suppositious situation of an employer who has given up all control over the price charged by the contractor, bargaining would be far from "fictitious". For the employer and the union could bargain about the amount (or proportion) of any price increase which would have to be paid for by the employer *as part of the employee's compensation.* The subsidy which Ford here provides to the food service operations (Pet. Br. 31) and the possibility of a profit by the employer (*id.*) are instructive because they demonstrate that the cost of the food to the employees is, *at bottom*, a part of the economic package Ford offers to its employees for their labor. Indeed, in referring to its collective agreement with the UAW, and the like agreements elsewhere, which provide for cost of living adjustments in the employees' wages (Pet. Br. 26-27), petitioner appears to recognize the degree of economic equivalence between wages and the bargaining demand at issue here.

The First Circuit in *NLRB* v. *Package Machinery Com-*

pany, 456 F.2d 936, 938 made the same point by characterizing a proposal for bargaining over in-plant food prices as a "demand from a union that the company should contribute to the expenses of lunch or snacks for those who do not wish to bring their lunch from home, or to take the trouble to drive to a nearby restaurant".[8] And yet that court held that bargaining over the company's contribution is not mandated by the Act:

> If food costs go up from time to time, as inevitably they seem to, it would appear more appropriate to bargain over wages, particularly when half of the employees do not use the company restaurant. In any event, on so thin a record we do not believe we should endorse so broad a principle. [*Id.*]

It is, we submit, precisely such judgments as to what would be "more appropriate to bargain over" that Congress left to employers and employees, rather than to the Board and the courts.

(b) Another of the points made by the *Westinghouse* and *Ladish* courts was that because there was more than one union in the plant, bargaining about food prices would be too cumbersome. (See Pet. Br. 35.) An identical argument was made and rejected in the first case which held

[8] See also *id.* at 937:

> The union seeks to debate simply the extent to which the company must subsidize the cost:[5]
>
> [5] To this extent a substantial red herring is sought to be introduced into the case by National Automatic Machines Assoc., which has submitted an amicus brief. The question is not whether the union is to sit down with the concessionaire in its day by day pricing, but is whether the union has a right to bargain over the bill which the company must pick up as a result of charging the employees below cost.

bargaining about pensions to be mandatory. In *Inland Steel* v. *NLRB*, (170 F.2d 247 (C.A. 7), cert. denied on this point, 336 U.S. 960), the company argued that it presently had a single pension plan for all its employees, and that it would not be feasible to adopt separate plans for its organized and its unorganized employees. The Court of Appeals approved the Board's rejection of that argument:

> We also are of the view that the bargaining requirements of the Act include all retirement and pension plans or none. Otherwise, as the Board points out, "some employers would have to bargain about pensions and some would not, depending entirely upon the unit structure in the plant and the nature of the pension plan the employer has established or desires to establish." Such a holding as to the Act's requirements would supply the incentive for an employer to devise a plan or system which would be sufficiently comprehensive and difficult to remove it from the ambit of the statute, and success of such an effort would depend upon the ingenuity of the formulator of the plan. We are satisfied no such construction of the Act can reasonably be made. [170 F.2d at 249.][9]

Thus, bargaining about a subject is not to be denied merely

[9] In this Court, Inland Steel stressed this point, arguing in part:

> Under the Act bargaining units are set up without regard to the scope of retirement and pension plans. The applicable statutory provisions as administered by the Board since the Act was passed have in hundreds of cases produced a multiplicity of bargaining units in a single company, particularly in large industrial concerns, as distinguished from single company-wide units. • • •
>
> The order of the Board, enforced by the decree of the court below, requires petitioner upon request to bargain collectively with the Union as the exclusive representative of all its employees in the bargaining unit in question with respect to its pension and retirement policies. Petitioner's pension and retire-

because a potential agreement, or even the most desirable potential agreement, would affect other employees of the same employer who are outside the bargaining unit. The statutory rights of one set of employees is not to be diminished because of the statutory rights of other employees; nor can these statutory rights be set off against each other to deprive both sets of employees of the right to bargain and to leave the matter to the exclusive control of the employer, thereby defeating the rights of all the employees.[10]

ment policies are embodied in its retirement and pension plan. Such policies and the plan which embodies them are, and have been since the plan was instituted in 1936, company-wide in scope. The Board's order would thus require petitioner to bargain with the Union concerning matters lying beyond the unit which it represents—a result clearly unlawful, since the bargain made with that Union would bind the petitioner to impose it on employees in other units having other bargaining representatives.

If it be argued that the Board's order requires the petitioner to bargain concerning retirement and pension policies applicable solely to the employees in the unit represented by the Union, then the effect of the decision will be to destroy the petitioner's company-wide plan, and all existing plans in this country which similarly extend beyond a single bargaining unit. A result so drastic, in view of the other considerations herein presented, would appear to warrant the exercise of this Court's discretion to grant the present petition. [Petition for Certiorari in No. 435, Oct. Term, 1948, pp. 8-9.]

[10] The other three factors to which petitioner refers (Pet. Br. 31-34) call for only brief comment.

The prior bargaining by these parties about food services is further evidence that this is a matter of mutual concern of the employer and the employees and concerning which collective bargaining can be fruitful. This is not to suggest however, and the Board did not state, that the result in this case would have been any different if the parties had not previously bargained about some aspects of food services. We note further that the passage in *Chemi-*

(c) It follows *a fortiori* that there is no basis for the argument advanced by the National Automatic Merchandising Association (NAMA), that bargaining between the employer and its employees over in-plant food prices cannot be required because the decision would affect the contractor's relationship with its employees. (NAMA Br. 7.) For the same reason, *NLRB* v. *Pipefitters*, 429 U.S. 507, cited at NAMA Br. 6, has nothing to do with this case. There the Court sustained the Board's determination that a union

cal Workers, supra, 404 U.S. at 187, quoted at Pet. Br. 31, does not hold that prior history of bargaining between the parties may not be pertinent in determining whether the subject is within § 8(d); that discussion appeared in Part IV of the Court's opinion which is addressed to the question whether the bar of § 8(d) against unilateral modification applies to permissive as well as mandatory bargaining subjects.

Petitioner contends that "The record • • • lacks substantial evidence to support the Board's conclusion" that there was no "viable alternative" to the in-plant cafeteria and vending machines. (Pet. Br. 31-32.) We think that the Court of Appeals' approval of the Board's determination forecloses further review here, p. 20, n. 7, *supra*. On principle, the absence of alternatives to eating in the plant bears only on the importance which the employees attach to their demands on this subject, and would therefore be relevant only if, contrary to our basic submission, a demand pertaining to the employer-employee relationship must be significant to be within § 8(d). Of course, if eating outside the plant is not inconvenient, the employees are less likely to insist to impasse on their demands with respect to in-plant services.

We agree with Pet. Br. 34 that the food services boycott would not convert food prices into a mandatory subject of bargaining if they were otherwise outside § 8(d); but the employees' willingness to take collective action demonstrates that the problem is one which can give rise to industrial unrest and that the basic purposes of the Act are served if the parties are required to seek an accord on the problem.

violated § 8(b)(4)(B) when it struck an employer to compel him to obtain certain work in accordance with its collective agreement on the ground that there was sufficient evidence to support the Board's finding that the union's object was to affect the labor relations of other employers, rather than to preserve the bargaining employees' work opportunities. The Court reaffirmed that the test of legality under § 8(b)(4) is whether "under all the surrounding circumstances * * * the agreement * * * was tactically calculated to satisfy union objectives elsewhere". (*Id.* at 520 quoting *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612.) Here there is not a scintilla of evidence that the UAW's demand with respect to food prices is "tactically calculated to satisfy union objectives elsewhere"—*viz.*, to affect the food service contractor's labor relations.

NAMA contends further that because the food contractor in this case has invested approximately $100,000 in vending machines in petitioner's plant and that requested changes in vending service would "entail either additional or alternative investments by the food-service and vending contractor", bargaining between Ford and the union about the food service should be excluded under the analysis of the concurring opinion in *Fibreboard*. (NAMA Br. 7.) The contention is totally without merit, since that opinion was addressed to the impact of an employer's statutory duty to bargain on that employer's right to make decisions "concerning the commitment of investment capital and the basic scope of the [employer's] enterprise." (373 U.S. at 223.) It was not at all concerned with the impact of bargaining between an employer and his employees on the investments of third parties. After all, the result of *Fibreboard*, as to which the Court was unanimous, was to require bargaining about the form of subcontracting involved in that case; an

employer's decision not to subcontract can have serious adverse consequences for the subcontractor and may destroy part or all of his investment. Indeed, NAMA's argument turns the analysis of the concurring opinion in *Fibreboard* inside-out. The thrust of that opinion, if it is pertinent at all, is that a vending machine contractor is not obligated to bargain with its employees as to the financial and other terms on which it should accept or reject the vending contract proferred by Ford, not that Ford is freed from its obligation to bargain with its own employees. Of course, a change in terms of the vending contract may affect the contractors ability to operate "profitably" (NAMA Br. p. 7) but there is nothing in the NLRA or in the "risk-capital free enterprise system" (*id.*) as we understand it, that assures entrepreneurs the right to operate "profitably".[11]

Finally NAMA advances an analogy between this case and *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 689 where it was said that Jewel was not required to bargain with its meat cutter employees regarding a "schedule of prices at which its meat would have to be sold". That opinion would be in point if this case involved a demand by the UAW that petitioner bargain with it concerning the price at which it sold automobiles or its other products *to the general public*. But the question here is whether the employer's duty to bargain encompasses the price which its employees will have to pay for food consumed during the lunch hour in the plant cafeteria and in vending machines on the plant's premises. That is not an entrepreneurial decision by Ford, such as the pricing of automobiles to its dealers and the

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[11] Even a regulated industry has no guarantee of profits, as this Court again observed in *FERC* v. *Pennzoil Producing Co.*, No. 77-648, Sl. Op. p. 10 (January 16, 1979).

public. Ford provides the cafeteria and makes the vending machines available as part of its labor relations policy. The formulation and implementation of that policy was withdrawn by the NLRA from Ford's unilateral control when its employees exercised their statutory right to bargain through a representative of their own choosing. A more pertinent analogy to the present case than *Jewel Tea* would be presented if a meat cutter's union sought to obtain as part of the employees' compensation a discount on meat purchases *by employees.*[12]

CONCLUSION

For the above stated reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[12] Compare *N.L.R.B.* v. *Central Illinois Public Service Co.*, 324 F.2d 916, 918-919, (C.A. 7) (gas discount, annually worth an average of $48 to each of the employees, held to be a mandatory bargaining subject).